GARY LESTER GRAY
GRACE MARIE RAYFIELD GRAY

IBLA 82-598 Decided September 22, 1982

Appeal from decision of Nevada State Office, Bureau of Land Management, rejecting Indian allotment applications N 34556 and N 34557.

Affirmed in part; vacated in part and remanded.

1. Act of March 6, 1958 -- Applications and Entries: Generally -- Indian Allotments on Public Domain: Classification -- Indian Allotments on Public Domain: Lands Subject to

   Where land has been segregated from all forms of disposition under the public land laws pursuant to an Act of Congress, the lands are "otherwise appropriated" within the meaning of sec. 4 of the General Allotment Act, and are not available for Indian allotment.

2. Applications and Entries: Generally -- Indian Allotments on Public Domain: Classification

   Where a petition for classification and an application for Indian allotment are filed together, for land not "otherwise appropriated," it is improper to reject the application without first ruling on the petition.

APPEARANCES: Gary Lester Gray and Grace Marie Rayfield Gray, pro sese.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Appeals have been taken by Gary Lester Gray and Grace Marie Rayfield Gray from the decision of the Nevada State Office, Bureau of Land Management (BLM), dated December 4, 1981, which rejected their separate Indian allotment

applications, N 34556 and N 34557, because the land sought was segregated from all forms of entry pursuant to the Act of March 6, 1958, 72 Stat. 31, and reserved for the Colorado River Commission of the State of Nevada.

Application N 34556 sought the NE 1/4 sec. 21, T. 25 S., R. 63 E., Mount Diablo meridian, Clark County, Nevada. Application N 34557 sought the SE 1/4 sec. 22, T. 25 S., R. 63 E. Each application was accompanied by a petition for classification of the land as suitable for Indian allotment.

By an order dated April 7, 1958, issued under authority of the Act of March 6, 1958, 72 Stat. 31, the Director of the Bureau of Land Management segregated, inter alia, all lands in T. 25 S., R. 63 E., from all forms of entry under the public land laws to permit application from the Colorado River Commission of the State of Nevada for conveyance to it of the lands described in the order. The segregation was to continue until any application from the Commission was finally disposed of by the Secretary of the Interior or his delegate. The Commission did apply for the transfer of, inter alia, all sec. 21 and W 1/2 sec. 22, T. 25 S., R. 63 E.

[1] Where lands have been segregated from operations of the public lands laws by an order directed by the Congress, the lands are "otherwise appropriated" within the meaning of section 4 of the General Allotment Act of 1887, 25 U.S.C. §§ 334, 336 (1976), and are not available for Indian allotment. An application for an Indian allotment is properly rejected when filed for land not available for settlement and disposition under the General Allotment Act when the application is filed. Lula Lorene McCracken Slowey, 58 IBLA 202 (1981); Thurman Banks, 22 IBLA 205 (1975). Accordingly, BLM properly rejected the Indian allotment application N 34556 for the NE 1/4 sec. 21, T. 25 S., R. 63 E., of Grace Marie Rayfield Gray.

[2] Where lands are not segregated from application under the public land laws, it is improper for BLM to reject an application for Indian allotment when the application is accompanied by a petition for classification of the land, without first ruling on the petition. Mary Frances Stiles, 64 IBLA 361 (1982).

After reviewing the petition-application to determine if it is regular on its face, BLM must first consider whether to classify the lands before it can properly evaluate the merits of the accompanying application. 43 CFR 2450.2. Accordingly, the BLM decision rejecting the application of Gary Lester Gray, N 34557, for the SE 1/4 sec. 22, T. 25 S., R. 63 E., is vacated, and the case remanded for consideration of the petition for classification. This Board has no jurisdiction to hear appeals from BLM decisions denying petitions for classification. See 43 CFR 2450.4 and 2450.5.

Appellants suggest the rejection of their applications is a violation of the Fifth Amendment, being a deprivation of property without due process of law. Contrary to appellants' belief, the mere filing of an application or the receipt of a certificate showing an Indian to be eligible to receive an allotment under section 4 of the General Allotment Act does not create a present right in the lands applied for by the individual Indian, but only a right to have the application considered. Finch v. United States, 387 F.2d

13 (10th Cir. 1967), cert. denied, 390 U.S. 1012; Clark v. Benally (On Rehearing), 51 L.D. 98 (1925); accord, John R. Bowen, A-28326 (July 11, 1960); Miles W. Payne, A-28030 (Aug. 17, 1959). Moreover, section 4 of the General Allotment act permits allotments only on unappropriated public domain lands outside of Indian reservations and, therefore, does not confer upon an Indian a vested right to an allotment. Cf. Martha Head, 48 L.D. 567 (1922).

Appellants' right to due process is protected by these appeals, and they may reapply for reclassification of any lands that the Department has authority to classify as suitable for disposition under the General Allotment Act, and land that is not "otherwise appropriated." Marjorie N. Underwood, 58 IBLA 21 (1981); Curtis D. Peters, 13 IBLA 4 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part; vacated in part, and the case remanded to BLM for further appropriate action.

_____
Douglas E. Henriques
Administrative Judge

We concur:

_____
C. Randall Grant, Jr.
Administrative Judge

_____
Will A. Irwin
Administrative Judge